67TH CONGRESS
2d Session

SENATE

DOCUMENT
No. 234

THE CONSTITUTION IS THE HIGHER LAW

An Answer to Articles written by Hon. Walter Clark, Chief Justice of the North Carolina Supreme Court

BY

PRESTON A. SHINN
OF PAWHUSKA, OKLAHOMA

PRESENTED BY MR. HARRELD

APRIL 20 (calendar day, JULY 15, 1922).—Ordered to be printed

WASHINGTON
GOVERNMENT PRINTING OFFICE
1922

THE CONSTITUTION IS THE HIGHER LAW.

AN ANSWER TO ARTICLES WRITTEN BY HON. WALTER CLARK, OF THE NORTH CAROLINA SUPREME COURT.

Hon. Walter Clark, of the North Carolina Supreme Court, has written several articles (which have been made public documents of the United States Senate), denying the authority of the United States Supreme Court to declare acts of Congress unconstitutional.[1] The question has recently been and is now before the Senate of the United States, and the articles of Justice Clark are receiving a generous circulation. It is evident, from the documents, that Justice Clark favors a government, not republican in form, but a democracy. Because of the very high position of Justice Clark, being the head of one of the great judicial bodies of the country, these articles will have very great weight with the public, and may be expected to do the cause of constitutional Government great injury.

The justice builds his structure on erroneous facts and history; fans the embers of prejudice until the castle is in flames, and then calls on the guests to save themselves by jumping from a tenth-story window. He says that the delegates who drafted, and the people who adopted the Constitution of the United States, did not know that the court would have authority to declare acts of Congress void, nor did they intend that the court have such authority; that the instrument itself fails to supply the authority.

The cornerstone of his structure has been condemned by every master builder to whom it has been presented. He thus states it: "This is in accordance with the theory of our Government, which is that the lawmaking body is one of restrictions:

That is, that it represents the people and has all power that is not denied it by the organic law, whereas, the Executive and judicial are grants of power and have no authority except that conferred by the Constitution. This is the statement made by Black, and sums up correctly the analysis of our State and Federal Constitutions as they are written."[2] This statement is probably true as to the State constitutions, but no basic error could be greater than the above statement that Congress "has all power that is not denied it by the organic law," when applied to the Federal Constitution. The States were 13 years old when the Federal Government was born, and the States, or the people, created the Federal Government by delegating to it certain authority belonging to the State and its people, retaining in the State, and its people, all the remaining powers and authority which it then had. Nothing in the science of our government is more firmly established than that the

[1] Government by Judges; Some Myths of the Law; Some Defects in the Constitution of the United States; Back to the Constitution.

[2] Back to the Constitution, p. 3.

United States is a government of delegated powers and authority—that we look to its Constitution to determine what the Congress can do; that the State constitutions are a limitation upon authority, and the legislature can enact all laws, except wherein it is forbidden. It is because of the fact that the Federal Constitution is an instrument of delegation that it becomes necessary for the people to have a tribunal, other than the Congress, to protect the States, and the people, from the encroachments of Congress.

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[1]

The Convention that drafted the Constitution met in 1787, and was in session for more than six months. Justice Clark devotes much space to the Convention, and says:

> Even in such a convention, thus composed and thus secluded from the influence of public opinion, the persistent effort to grant the judges such power was repeatedly and overwhelmingly denied. The proposition was made, as we now know, from Mr. Madison's journal, that "the judges should pass upon the constitutionality of acts of Congress." This was defeated June 4, receiving the votes of only two States. It was renewed no less than three times, i. e., on June 6, July 21, and finally again, for the fourth time, on August 15, it was brought forward, and though it had the powerful support of James Madison, afterwards President Madison, and James Wilson, afterwards a justice of the United States Supreme Court, the proposition at no time received the votes of more than three States. On this last occasion, August 15, Mr. Mercer thus summed up the thought of the Convention, as evidenced by its vote: "He disapproved of the doctrine that the judges, as expositors of the Constitution, should have authority to declare a law void. He thought the laws ought to be well and cautiously made, and then to be incontrovertible." [2]

It is the intention of Justice Clark to say that the Convention voted on this question: "The judges should pass upon the constitutionality of the acts of Congress," and he attempts to prove that Mr. Mercer expressed the thought of the Convention by quoting a part of the speech of Mr. Mercer, as reported in Mr. Madison's journal of the proceedings of the Convention. I have examined three editions of Madison's Journal, and the Convention did not have this question before it on August 15, nor on any other day.[3]

The Virginia delegation in the Convention, by Governor Randolph, presented a set of resolutions to the Convention, as a plan or basis for a Constitution. The eighth resolution provided for a "Council on Revision" of the acts of Congress, composed of the Executive and a convenient number of the Supreme Judiciary, and if this "Council on Revision" failed to agree with Congress on the policy of the proposed law, it then would become necessary for Congress to pass the same over the veto of the "Council on Revision" by a —— vote of Congress.

This number was left blank, same to be filled in by a vote of the Convention. The debates of the Convention conclusively prove that the object of having this "Council on Revision" was to pass upon the policy of enacting the proposed law, and it was what we know to-day as the veto power of the President. This question

---

[1] Tenth amendment to United States Constitution.
[2] Government by Judges, p. 9.
[3] Documentary History of United States Constitution, published by State Department, vol. 3; Scott's Madison's Journal; and Elliot's Debates, vol. 5.

was before the Convention several times, and each time practically in the same form. On August 15, the last time, Mr. Madison moved "that all acts before they become laws should be submitted both to the Executive and Supreme Judiciary Departments, that if either of these should object two-thirds of each House, if both should object, three-fourths of each House should be necessary to overrule the objections and give to the acts the force of law." [1] This motion was seconded by Mr. Wilson.

Mr. Pinckney opposed the interference of the judges in the legislative business: It will involve them in parties, and give a *previous* tincture to their opinions.[2]

Mr. Mercer heartily approved the motion. It is an axiom that the judiciary ought to be separate from the legislative: but equally so that it ought to be independent of that department. The true policy of the axiom is that the legislative usurpation and oppression may be obviated. He disapproved of the doctrine that the judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontrollable [incontrovertible].[3]

Mr. GERRY. This motion comes to the same thing with what has been already negatived.[4]

Mr. Mercer, who had only been in the Convention since August 6, had evidently been informed as to the previous attitude of the delegates on the right of the Supreme Court to declare laws of Congress unconstitutional, and he was opposed to this "doctrine," and favored the judges participating with the Executive in the veto power. But the Convention voted against the view of Mr. Mercer by a vote of eight States to three.[1] Mr. Mercer was with the minority, and not the majority, as stated by Justice Clark, supra.

Mr. Dickenson was strongly impressed with the remark of Mr. Mercer as to the power of the judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute.[5]

Thus we find Mr. Dickenson supporting the position of Mr. Mercer, but admitting that some plan, or "expedient" was necessary to hold the Congress in check. Delaware, the State of Mr. Dickenson, and Maryland, the State of Mr. Mercer, were of the three States that voted for the motion. The question had been settled in the minds of the delegates, as evidenced by their former proceedings, and they refused to concur in the view of Mr. Mercer, and he did not express the "thought of the Convention, as evidenced by its vote."

The question was first before the Convention on June 4 in this form: "Resolved, that the Executive, and a convenient number of the national judiciary, ought to compose a council of revision," being the first clause of Randolph's eighth resolution.[6]

Mr. Gerry doubts whether the judiciary ought to form a part of it, as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality. In some States the judges had actually set aside laws as being against the Constitution. This was done, too, with general approbation. It was quite foreign from the nature of the office to make them judges of the policy of public measures. He moves to postpone clause in order to

[1] The three editions of Madison's Journal, Aug. 15, 1787.
[2] Madison's Journal, Aug. 15, vol. 3, Doc. Hist. Con., 537.
[3] Ibid., 537.
[4] Ibid., 537.
[5] Madison's Journal, Aug. 15, vol. 33, Doc. Hist. Con., 538.
[6] Madison's Journal, June 4, vol. 3, Doc. Hist. Con., 18, 54.

propose "that the national Executive shall have a right to negative any legislative act which shall not be afterwards passed by —— parts of each branch of the National Legislature." [1]

Mr. King seconds the motion, observing that the judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation.[2] The Gerry motion carried and the question was not further considered until the 6th, when the question was the same as on the 4th. On the 6th, Mr. Madison said: "An association of the judges in this revisionary function would both double the advantage, and diminish the danger. It would also enable the Judiciary Department the better to defend itself against legislative encroachments. Two objections had been made—first, that the judges ought not to be subject to the bias which a participation in the making of laws might give in the exposition of them; secondly, that the Judiciary Department ought to be separate and distinct from the other great departments. The first objection had some weight." [3]

He then goes on in explanation of these objections. Others spoke on the question, but the motion to join the judiciary with the Executive in the veto power was defeated.

The same question, upon motion by Mr. Wilson, was fully debated by the Convention on July 21. It is somewhat strange that Justice Clark thought best not to advise the public of what was said in the debates on the 21st and the other days when this question was being considered. He mentions a very small part of the speech of Mr. Mercer, on August 15, and then brushes the question aside as being settled by his own statement that the Convention did not intend that the court have this authority. Because of his high public position, the public is expected to consider the question as settled. On the 21st Mr. Wilson moved as an amendment to the tenth resolution "That the Supreme National Judiciary should be associated with the Executive in the revisionary power."

Mr. Wilson said:

This proposition had been before made and failed; but he was so confirmed by reflection in the opinion of its utility that he thought it incumbent on him to make another effort. The judiciary ought to have an opportunity of remonstrating against projected encroachments on the people as well as on themselves. It had been said that the judges, as expositors of the laws, would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the judges did no go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the judges in refusing to give them effect. Let them have a share in the revisionary power, and they will have an opportunity of taking notice of those characters of a law, and of counteracting, by the weight of their opinions, the improper views of the legislature.[4]

Mr. Gorham did not see the advantage of employing the judges in this way. As judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures. Nor can it be necessary as a security for their constitutional rights.[5]

Mr. Gerry did not expect to see this point, which had undergone full discussion, again revived. The object he conceived of the revisionary power was merely to secure the executive department against legislative encroachment. The Executive, therefore, who will best know and be ready to defend his rights ought alone to have the defense of them.[6]

Mr. Strong thought, with Mr. Gerry, that the power of making ought to be kept distinct from that of expounding the laws. No maxim was better estab-

---

[1] Madison's Journal, June 4, vol. 3, Doc. Hist. Con., 54.
[2] Ibid., 55.
[3] Madison's Journal, June 6, vol. 3, Doc. Hist. Con., 77.
[4] Madison's Journal, July 21, vol. 3, Doc. Hist. Con., 390.
[5] Ibid., 391.
[6] Ibid., 392.

lished. The judges in exercising the function of expositors might be influenced by the part they had taken in passing the laws.[1]

Mr. L. Martin considered the association of the judges with the executive as a dangerous innovation; as well as one that could not produce the particular advantage expected from it. A knowledge of mankind and of legislative affairs can not be presumed to belong in a higher degree to the judges than to the legislature. And as to the constitutionality of laws, that point will come before the judges in their official character. In this character they have a negative on the laws. Join them with the Executive in the revision, and they will have a double negative.[2]

Colonel Mason observed that the defense of the Executive was not the sole object of the revisionary power. He expected even greater advantages from it. Notwithstanding the precaution taken in the constitution of the legislature, it would still so much resemble that of the individual States that it must be expected frequently to pass unjust, pernicious laws. This restraining power was therefore essentially necessary. It would have the effect, not only of hindering the final passage of such laws, but would discourage demagogues from attempting to get them passed. It has been said (by Mr. L. Martin) that if the judges were joined in this check on the laws, they would have a double negative, since in their expository capacity of judges they would have one negative. He would reply, that in this capacity they could impede, in one case only, the operation of the laws. They could declare an unconstitutional law void. But with regard to every law, however unjust, oppressive, or pernicious, that did not come plainly under this description, they would be under the necessity, as judges, to give it a free course. He wished the further use to be made of the judges of giving aid in preventing every improper law.[3]

Mr. Rutledge thought the judges of all men the most unfit to be concerned in the revisionary council. The judges ought never to give their opinion on a law till it comes before them. He thought it equally unnecessary. The Executive could advise with the officers of State, as of War, Finance, etc., and avail himself of their information and opinions.[4]

The motion of Mr. Wilson to join the judiciary with the Executive as a council of revision failed, and it was left, as the Convention had already decided, with the Executive, whose title at that time had not been fixed by the Convention, but was afterwards termed "the President." He retains this authority to-day, and it requires a two-thirds vote to pass the act over the veto of the President. From the above debate it will appear that it was generally considered by the Convention that under the Constitution the Supreme Court would have authority to declare void laws unconstitutional. Many of the speakers so declared, and in no instance was there a member who denied the right. It will be noticed from the debates, supra, that each speaker considered the council on revision only for the purpose of passing on the policy, or advisability, of enacting the proposed law, and not as suggested by Justice Clark, supra.

The mind of the Convention was expressed incidentally on other occasions. It was urged in the Convention that Congress have authority to negative any law of a State which might conflict with the Federal laws.

Mr. Sherman thought it unnecessary, as the courts of the States would not consider as valid any law contravening the authority of the Union.[5]

On August 22 the question of *ex post facto* laws was before the Convention, and Mr. Williamson said:

---

[1] Madison's Journal, July 21, vol. 3, Doc. Hist. Con., 393.
[2] Ibid., 395.
[3] Ibid., 396.
[4] Ibid., 399.
[5] Madison's Journal, July 17, vol. 3, Doc. Hist. Con., 351.

Such a prohibitory clause is in the Constitution of North Carolina, and though it had been violated, it has done much good there and may do good here, because the judges can take hold of it.[1]

And again, on August 28, we find

Mr. Madison. Is not that already done by the prohibition of *ex post facto* laws, which will oblige the judges to declare interferences null and void?[2]

So if Madison's Journal, cited by Justice Clark, and the letters written by members of the Convention are to be given their proper weight there can be no doubt as to the intention of the Convention to confer in the Constitution authority upon the Supreme Court to declare void acts of Congress unconstitutional. When the history of the Constitution is studied step by step we can not doubt but that the language of the Constitution confers the authority. On August 26 the present section 2 of Article III read: "The judicial power shall extend to all cases, in law and equity, arising under the laws of the United States, * * *." On August 27 Doctor Johnson moved to insert the words 'this Constitution and the' before the word 'laws.'"[3]

Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the court generally to cases arising under the Constitution, and whether it ought not to be limited to cases of a judiciary nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that department.[3]

The motion of Dr. Johnson was agreed to nem. con., it being generally supposed, that the jurisdiction given was constructively limited to cases of a judiciary nature.[3]

Section 2 of Article III, now reads: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States * * *." No one will doubt but that the Constitution is an instrument of greater authority than congressional acts, and Article VI, of the Constitution, wherein it says: "This Constitution, and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land," is conclusive on this point. The judicial power extends to all cases arising under the Constitution and the laws of the United States, which shall be made in pursuance thereof—then, is it not necessary for the court, when the question is properly raised, to say whether or not the act of Congress is authorized by, or in "pursuance" of, the Constitution?

Justice Clark in each of his articles says that Jefferson, Jackson, and Lincoln, criticized the Supreme Court, intending, no doubt, to leave the impression that each of them questioned the authority of the Court to choose between the Constitution and the acts of Congress. Some of these men were on several sides of many questions—let them speak for themselves. Shortly after the election of Mr. Jefferson to the presidency, the Legislature of Rhode Island presented him with a congratulatory address soliciting an expression of his views on the Federal Constitution, and in his reply thereto Mr. Jefferson said:

---

[1] Madison's Journal, Aug. 22, vol. 3, Doc. Hist. Con., 593.
[2] Madison's Journal, Aug. 28, vol. 3, Doc. Hist. Con. 631.
[3] Madison's Journal, Aug. 27, vol. 3, Doc. Hist. Con., 626.

The Constitution shall be administered by me according to the safe and honest meaning contemplated by the plain understanding of the people at the time of its adoption—a meaning to be found in the explanations of those who advocated, not those who opposed it. These explanations are preserved in the publications of the time.[1]

What were the publications of the time? After the Convention had concluded its labors, the proposed Constitution was submitted to the people of the State for adoption. Not to the legislatures of the States, as suggested by Justice Clark, but to the people through their chosen delegates, for that purpose.[2] In many of the States there was great opposition to the adoption of the Constitution, both by speeches and through the press. Its enemies raised every conceivable objection to its adoption. That the Congress had too much power; that the President would become a king, and that too much authority had been given to the Federal courts. The friends of the Constitution did not deny that great power had been given to the courts, and that it would be the duty of the Supreme Court to declare void acts of Congress unconstitutional, but defended the same, both by public speeches and through the press.

Hamilton, one of the most active members of the Constitutional Convention, and Madison, also a member of the Convention, known as the "father of the Constitution," with John Jay, published a series of articles under the name of "Publius" defending and expounding the meaning of the Constitution. These articles were copied by the press in most of the States where there was a contest, and were published in pamphlet form and given very wide circulation, becoming known as the "Federalist." Six of these articles are devoted to the judiciary, and they are most instructive. No doubt Mr. Jefferson had the Federalist in mind when he wrote to the Legislature of Rhode Island. In No. LXXVIII (and everyone should read the entire paper) Mr. Hamilton said:

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void because contrary to the Constitution has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void must necessarily be superior to the one whose acts must be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests can not be unacceptable.

There is no position which depends on clearer principles than every act of delegated authority contrary to the tenor of the commission under which it is exercised is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize but what they forbid.

A constitution is, in fact, and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the

---

[1] Elliot's Debates, vol. 4, p. 446.
[2] Elliot's Debates, vol. 1, pp. 319, 335, Article VII of Constitution.

meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable varience between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.

Can argument be more convincing than the above from Hamilton? John Marshall was one of the delegates to the Virginia Convention which adopted the Constitution. The Constitution was most bitterly fought in that Convention. Patrick Henry with all the force of his great eloquence led the fight against its adoption, and did not overlook the Supreme Court of the United States. In reply Mr. Marshall said in part:

These, sir, are the points of Federal jurisdiction to which he objects, with a few exceptions. Let us examine each of them with a supposition that the same impartiality will be observed there as in other courts, and then see if any mischief will result from them. With respect to its cognizance in all cases arising under the Constitution and the laws of the United States, he says that, the laws of the United States being paramount to the laws of the particular States, there is no case but what this will extend to. Has the Government of the United States power to make laws on every subject? Does he understand it so? Can they make laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same State? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void.[1]

Patrick Henry, among other things, said:

When Congress, by virtue of this sweeping clause, will organize these courts, they can not depart from the Constitution, and their laws in opposition to the Constitution would be void. If Congress, under the specious pretense of pursuing this clause, altered it and prohibited appeals as to fact, the Federal judges, if they spoke the sentiments of independent men, would declare their prohibition nugatory and void.[2]

Wilson and others, in Pennsylvania; Ellsworth and Sherman, in Connecticut; and delegates in all the conventions where the question was raised, admitted that the Constitution gave the authority to the Supreme Court, and defended it. President Adams, knowing John Marshall's avowedly strong views on the authority of the court in this regard, appointed him in 1801 Chief Justice of the court, saying, "This is the greatest act of my administration." Luther Martin, a delegate from Maryland to the Constitutional Convention, refused to sign the instrument and wrote a letter to the people of Maryland, in which he called attention to the many things which he considered defects in the new Constitution, and urged the people not to adopt it, had this to say of the court:

Whether, therefore, any laws or regulations of the Congress, any acts of its president or other officers, are contrary to, or not warranted by, the Constitution, rests only with the judges who are appointed by Congress, to determine; by whose determination every State must be bound.[3]

---

[1] Elliot's Debates, vol. 3, p. 553. .
[2] Ibid., pp. 540, 541.
[3] Ibid., p. 380.

For several years after the adoption of the Constitution, there sat in Congress many of the men who had been active in the Constitutional Convention, and the debates of the early sessions of Congress throw much light on the meaning of the instrument. In the Senate in January, 1800, Mr. Mason said:

It will be found that the people, in forming their Constitution, meant to make the judges as independent of the legislature as of the Executive, because the duties they have to perform call upon them to expound not only the laws, but the Constitution also, in which is involved the power of checking the legislature in case it should pass any laws in violation of the Constitution. For this reason, it was more important that the judges in this country should be placed beyond the control of the legislature, than in other countries, where no such power attaches to them.

He knew that they might pass unconstitutional laws, and that the judges, sworn to support the Constitution, would refuse to carry them into effect; and he knew that the legislature might contend for the execution of their statutes. Hence the necessity of placing the judges above the influence of these passions; and for these reasons the Constitution had put them out of the power of the legislature.[1]

The celebrated "Virginia resolutions" of 1798, pronouncing certain alien and sedition laws unconstitutional and calling on the other States to join Virginia in resisting them, received a cold shoulder from most of the States, and the reply of Rhode Island is somewhat typical of the answers received by Virginia:

In General Assembly, February, A. D. 1799.

Certain resolutions of the legislature of Virginia, passed on 21st of December last, being communicated to this Assembly—

1. *Resolved*, That, in the opinion of this legislature, the second section of third article of the Constitution of the United States, in these words, to wit, "The judicial power shall extend to all cases arising under the laws of the United States," vests in the Federal courts, exclusively, and in the Supreme Court of the United States, ultimately, the authority of deciding on the constitutionality of any law of the Congress of the United States.[2]

It is generally known that Webster had no doubts as to the authority of the court, and in the famous debate in the Senate in 1830 between Mr. Webster and Mr. Hayne, with which most school boys are familiar, Mr. Hayne said:

But there is one point of view in which this matter presents itself to my mind with irresistible force. The Supreme Court, it is admitted, may nullify an act of Congress by declaring it to be unconstitutional. Can Congress, after such a nullification, proceed to enforce the law, even if they should differ in opinion from the court?[3]

Justice Clark says that Jackson had denied the authority of the Supreme Court in this respect. In November, 1832, South Carolina passed an ordinance, touching the tariff laws of the United States, which, had the State been permitted to carry out, would have taken the State out of the Union. President Jackson issued a proclamation to the State, which had the desired effect, wherein he said:

If it should be said that public opinion is a sufficient check against the abuse of this power, it may be asked why it is not deemed a sufficient guard against the passage of an unconstitutional act by Congress. There is, however, a restraint, in this last case, which makes the assumed power of a State more indefensible, and which does not exist in the other. There are two appeals from an unconstitutional act passed by Congress—one to the judiciary, the other to the people and the States.[4]

---

[1] Elliot's Debates, vol. 4, p. 442.
[2] Ibid., p. 533.
[3] Ibid., p. 514.
[4] Ibid., 584.

Lincoln exercised the right to criticize the court, but he never denied the right of the court to declare void acts unconstitutional. In a speech in Springfield, Ill., he said:

> We believe as much as Judge Douglas (perhaps more), in obedience to and respect for the judicial department of government. We think its decisions on constitutional questions, when fully settled, should control, not only the particular case decided, but the general policy of the country, subject to be disturbed only by amendments to the Constitution as provided in that instrument itself. More than this would be revolution.[1]

History does not support, and for that reason I can not agree with the statement that, "Judge Marshall recognized this in Marbury *v.* Madison, in which case in an obiter opinion he had asserted the power to declare an act of Congress unconstitutional, for he wound up by refusing the logical result, the issuing of the mandamus sought, because Congress had not conferred jurisdiction upon the Supreme Court to issue it."[2] Marbury *v.* Madison, as to the point in question, was in no sense of that word an obiter opinion, as it was a necessary part of the court's opinion.

The people in the Constitution had established the original jurisdiction of the Supreme Court, but left it to Congress to regulate the appellate jurisdiction. The Congress in 1789, among other things, attempted to confer original jurisdiction on the court in mandamus. Upon the application of Marbury, the court, under the act of 1789, granted the "rule" requiring the Secretary of State, Mr. Madison, to show cause why a mandamus should not issue compelling him to issue to Marbury his commission as a justice of the peace in the District of Columbia. When the case came on for hearing before the court its jurisdiction to issue the writ of mandamus was questioned. Every lawyer knows that the court's first duty was to decide that question, and the decision of that question could not be obiter, it being absolutely necessary. The court said:

> Congress can not confer on this court any original jurisdiction.
>
> When the Constitution and an act of Congress are in conflict, the Constitution must govern the case to which they both apply.
>
> An act of Congress repugnant to the Constitution is not law.
>
> To issue a writ of mandamus, requiring a Secretary of State to deliver a paper, would be an exercise of original jurisdiction not conferrable by Congress, and not conferred by the Constitution on this court.[3]

So instead of holding out for greater authority, the court refused to accept of authority, which the people in their Constitution had not conferred upon the court. The writ of mandamus was refused, not because "Congress had not conferred jurisdiction," but because Congress was acting without jurisdiction, as the people had already acted when they adopted the Constitution.

The court may have used obiter on another question in this case, but, if so, its words will sound very sweet to the readers of Mr. Clark. Keep in mind that it was the Secretary of State, a great Cabinet officer, whose acts were in question in this case. The court says:

---

[1] Reply to Douglas, June 26, 1857, Centenary Edition of Lincoln's Speeches.
[2] Some Defects in the Constitution, p. 14.
[3] Marshall's Constitutional Decisions (Dillon), 2.

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the King himself is sued in the respectful form of a petition, but he never fails to comply with the judgment of his court.

The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested right.

Questions in their nature political, or which are by the Constitution and laws submitted to the Executive, can never be made in this court.

But if this be not such a question; if, so far from being an intrusion into the secrets of the Cabinet, it respects a paper which according to law is upon record, and to a copy of which the law gives a right on the payment of 10 cents; if it be no intermeddling with a subject over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer which shall bar a citizen from asserting in a court of justice his legal rights, or shall forbid a court to listen to the claim, or to issue a mandamus directing the performance of a duty not depending on Executive discretion, but on particular acts of Congress and the general principles of law?

If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it can not be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law.

The court held that Marbury had a right of action against the Secretary of State to compel him to deliver his commission, but that he was in the wrong court, as the Constitution had not conferred original jurisdiction on the Supreme Court to issue mandamus.

Among the many criticisms of the Supreme Court made by Justice Clark, he has this to say concerning the fourteenth amendment.

Aware of this defect, the court since the war has sought to found its jurisdiction to nullify legislative action upon the fourteenth amendment. It has been well said that that amendment, which was intended for the protection of the negro, had failed entirely in that purpose, but has become a very tower of strength to the great aggregations of wealth. Not only no force can be justly given to the construction placed by the Supreme Court upon the fourteenth amendment, from the knowledge of the history of its adoption, but the words used can not fairly be interpreted as they have been. "Due process of law" means the orderly proceeding of the courts, and the "equal protection of the laws" was never intended to give to the Federal courts irreviewable supremacy over Congress and the President.[1]

That section of the fourteenth amendment, referred to by Mr. Clark, is an inhibition against the States, and confers no rights upon Congress, other than to enforce the inhibition: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Shortly after the Civil War, Congress passed laws which came before the court, and the attorney for the United States contended that they were authorized by the fourteenth amendment.

The court held that the language of the acts did not bring them within the fourteenth amendment, and that the acts were repugnant to the tenth amendment, supra. I doubt if there can be found a

[1] Back to the Constitution (Clark), 11.

single opinion by the Supreme Court that warrants the attack of Mr. Clark. The court has consistently held that the fourteenth amendment applies only to the States, acting by their authorized agents, as the legislature, the courts, etc., and that it does not inhibit the citizens of a State, except where they represent and speak for the State.

Many other statements of Mr. Clark are not supported by the facts, for instance, that the income tax law of 1894 was passed by "the lower house unanimously, and I believe there were only one or two votes against it in the Senate. The President, who was a good lawyer, approved it,"[1] and then it was declared unconstitutional by "five elderly lawyers, selected by influences naturally antagonistic to the laboring classes."[2] The facts are, that the law passed the House, not unanimously, but by a vote of 204 for to 140 against it. In the Senate the vote was 39 for and 34 against, with 12 Members refusing to vote, and President Cleveland refused to approve of the bill, and allowed it to become a law by holding it for 10 days.[3] It is more than likely that the ability of the minority who opposed the act, and of the "President, who was a good lawyer," who refused to approve the same, was greater than the ability of those who "unanimously" passed the law. Read and study the lives of the "elderly lawyers" who compose the Supreme Court now, or at any time prior, and decide for yourself if there is any reason why they should be "antagonistic to the laboring classes." Read the opinions of the Supreme Court for the past 20 years, and see if these "elderly lawyers" have not by obiter blazed the way for much of the progressive legislation during that period. Read the recent opinion of the court on the Adamson law and you will be able to make a pretty good guess as to the character of railroad legislation we have a right to expect within a reasonably short period.

The words of Lincoln in 1860 seem quite pertinent at this time. Senator Douglas, without going into the facts, declared to his people that his position on the question of slavery was the position of the "fathers." Lincoln, in a speech in 1860 in Cooper Union, replied to the assertion of Douglas, as to the position of the "fathers," using these words:

> But he [Douglas] has no right to mislead others who have less access to history, and less leisure to study it, into false beliefs that our fathers who framed the Government under which we live were of the same opinion—thus substituting falsehood and deception for truthful evidence and fair argument.

PRESTON A. SHINN.

PAWHUSKA, OKLA.

---

[1] Government by Judges (Clark), 12.
[2] Defects in Constitution of the United States (Clark), 13.
[3] Senate Document 547, p. 13, of 60th Congress, 2d Session.